No. 14812.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Statement of the Pleadings.

Appellant was charged in an indictment filed in the United States District Court, in and for the Southern District of California, with a violation of U. S. C., Title 18, Section 1709—Theft of Mail by Postal Employee [Clk. Tr. p. 2]. Defendant entered a plea of not guilty as charged in the Indictment [Clk. Tr. p. 3].

The matter proceeded to trial before a jury [Clk. Tr. p. 4]. Appellant was found guilty as charged [Clk. Tr. p. 7]. Appellant was sentenced to three years in prison [Clk. Tr. p. 12].

This is an appeal from the judgment rendered against defendant [Clk. Tr. p. 17].

Basis of Jurisdiction.

It is contended that the District Court had jurisdiction by virtue of Title 18, Section 546 U. S. C., and this Court has jurisdiction to review the judgment in question by virtue of Title 28, Sections 41(2) and 225(a) U. S. C.

Statement of Case.

This is a case wherein defendant and appellant, James Gresham, was charged with theft of mail. He entered a not guilty plea and trial was by jury. After the trial, the matter was submitted to the jury for a verdict on February 28, 1955, at 9:09 A. M. At 2:20 P. M. the jury returned to Court and requested further instructions. The Court instructed the jury further, and at 2:55 P. M. the jury retired to deliberate further. At 4:00 P. M. the jury returned to Court and stated that it was deadlocked. The Court requested the jury to deliberate further and *at this time the Court further charged the jury.* At 4:15 P. M. the jury retired to deliberate further. At 4:40 P. M. the jury returned to Court with a verdict of guilty [Clk. Tr. p. 14].

Specifications of Error.

1. The comments, remarks and conduct of the trial judge were calculated to coerce, command or influence the jury to reach a verdict which prevented Appellant from having a fair and impartial trial in violation of his Constitutional rights.

ARGUMENT.

I.

The Trial Court Coerced the Jury Into Arriving at a Verdict.

The following proceedings were had:

"The Court: The jury has returned to the court-room. The defendant is present with counsel. The prosecutor is here.

Mr. Foreman, what seems to be the difficulty now?

The Foreman: Your Honor, there seems to be—

The Court: Don't tell me how the jury stands numerically, but is there some way in which we can help you?

The Foreman: I don't think so, your Honor. There are quite a number of things, relative to the situation, that some of our jurors can't meet eye to eye, and I don't believe the barrier could be broken through.

The Court: When that has happened before the judges here quite generally give an instruction which I will try to remember for you. I am going to ask you to try again for a little while.

It appears that this jury has what is commonly called a deadlock. I hope you don't really have one. I have been sitting here now into my fourth year and I have only had one deadlocked jury out of many jury trials, both civil and criminal.

You should bear in mind that each of you has, while an individual juror, been selected because of an appraisal made by the prosecutor and an appraisal made by the defendant, appraisal made by the court that you are reasonable persons. That you are capable of making decisions and that you are not inclined to be stubborn.

Now, since each one of yau had been selected with that in mind by Mrs. Bulgrin, by Mr. Woolsey, by the defendant, by me, it would seem that you either can break through the barrier or some one of you, or more of you, have not turned out to be the type of jurors we thought you were.

This is not a long case, nor a particularly difficult one. It seems to me the main difficulty you have is that the case hangs entirely on circumstantial evidence.

Now, the law makes no distinction between circumstantial evidence and other evidence, except that in order to warrant a verdict of guilty the evidence must be consistent only with guilt, and inconsistent with any reasonable hypothesis of innocence.

Now, you remember what the evidence was. If you don't, we can have it read to you. It is a matter of considerable effort for the lawyers to go through a case of this kind. If you disagree, it is going to call upon the attorneys to put in another day trying the case, and require the services of another jury; a lot of waste of time. While we don't pay you much, it is some drain on the budget that is voted on a rather miserly basis by the Congress to take care of this sort of thing.

Won't you please go back to the jury room and each of you bear in mind that the jurors who are opposed to your way of thinking were selected in the belief that they were as reasonable as you and you as reasonable as they. Start out fresh and see if you can't come to a verdict. If you can't, I will discharge you shortly after 5:00. But being the quality people you are, I take it that you will be able to get together.

You should bear in mind that no one should surrender a firm conviction, if you have that, but you ought to recanvass your thoughts, all of you. Each and every one of you should canvass your thoughts

regarding the case, in the lights of the fact that other people who are presumptively reasonable as you are feel otherwise. Try to talk it over again, and we will keep you here until a little after 5:00.

Now, do you have anything we can help you with before sending you back?

The Foreman: I might say that we have been working on this thing from this morning. I am not going to advise your Honor how many ballots we have taken, or anything of that nature. But the statements were made that we are hopelessly deadlocked up to this present moment. Whether it will do any good to go back or not I don't know. We might try, at your suggestion.

The Court: I wish you would try. Try it briefly, and anyone who has a very firm conviction, after the new discussion, should not surrender it simply because there are a large number of jurors of a different persuasion.

Let's see if the jury are all of the mind of the foreman. Start out with No. 1. Do you think, Juror No. 1, there is a possibility you might agree?

Juror Graff: No, your Honor.

The Court: Juror No. 2, do you think so?

Juror Chandler: Judging from the day's voting, I think there is going to be no change.

The Court: Juror No. 3?

Juror Enders: I think there is a possibility.

The Court: Juror No. 4?

Juror Steele: A very slight possibility, sir.

The Court: No. 5?

Juror Gibbs: I doubt it.

The Court: No. 6?

Juror Durand: I doubt it.

The Court: No. 7?

Juror Kimbrell: I doubt it.

The Court: No. 8?

Juror Danely: In view of one remark, your Honor, I am fairly certain there is no possibility.

The Court: No. 9?

Juror Lowe: I think that we might.

The Court: No. 10?

Juror Rosenau: I think we might, also.

The Court: No. 11?

Juror Codon: I still have faith in the human element.

The Court: No. 12?

Juror Ray: I doubt it, sir.

The Court: There is an instruction that Judge Harrison in the next courtroom almost always gives to juries, which goes somewhat in tenor like this: That it is seldom productive of good for a juror in the jury room to announce with any force a belief in a particular position, because it is only human, when we say we believe a certain thing to be so, to tend to thereafter argue for the premise that we have set forth. And to emphatically assert you believe one position or the other is to call upon your subconscious to argue for the upholding of that premise. But that is something that is common to advocates or lawyers in the courtroom. It isn't an attribute of judges, and you people are judges; so far as the facts of this case are concerned you are only judges. The Court of Appeals cannot reverse any decision you make on the facts.

You are judges of the court, so far as the facts are concerned, much more so than I, more so than Chief Justice Warren. And being judges, you should try to act like judges.

So you may retire and try again" [Rep. Tr. pp. 161-166].

In *Kesley v. United States,* 47 F. 2d 453, the Court had a case where a situation similar to the instant case was presented to the Court for decision. In reversing the conviction the Court said:

> "There must be no coercion outside of the force of reason and advice as to the facts. *People v. Sheldon,* 756 N. Y. 268. Thus while the length of time the jury may be kept together is discretionary with the judge, he cannot threaten them with such imprisonment. *State v. Place,* 20 S. D. 489. The judge may urge the minority to carefully consider the fact that they are in the minority in reviewing the correctness of their position. *Allen v. United States,* 164 U. S. 493. But comments, not upon the evidence, but reflecting on the jurors, are not permissible. *People v. Sheldon, supra; Hagen v. N. Y. Central R. R.,* 79 App. Div. 519. In *State v. Bybee,* 17 Kan. 462 Justice Brewer said: 'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity. Personal consideration should not influence his conclusions; and the thought of them should never be presented to him as a motive for action.' Because of the imputation of stubbornness, or worse, which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error *per se* in the Courts of the United States. *Brashfield v. United States,* 272 U. S. 448. Much more serious is an imputation by the judge that some of the jurors are forgetting their oaths. It might even be interpreted as a threat of punishment as for contempt of Court."

See:

Lively v. Sexton, 35 Ill. App. 417.

A judge may advise, and he may persuade, but he may not command, unduly influence, or coerce.

Wissel v. United States, 22 F. 2d 468.

After a jury reports a failure to agree and there are dissenting jurors, it transcends the proper limits of judicial discretion and authority for the trial judge to characterize the dissenting jurors as "contrary," and to declare that there should be no trouble about agreeing on a case like this one before them, and that it simply called for the sensible reasoning of men according to the evidence.

People v. Carder, 31 Cal. App. 355.

See:

People v. Kindleberger, 100 Cal. 367.

Admonitions to the jury as to the importance of agreement, which referred to the expense of a retrial of the cause, held to be erroneous.

Peterson v. United States, 213 Fed. 920;
State v. Chambers, 9 Ida. 673;
State v. Clark, 38 Nev. 304.

Statements and instructions which have the effect of unduly hastening the rendition of a verdict should never be made or given.

Peterson v. United States, supra;
Edwards v. United States, 7 F. 2d 598.

See:

Maury v. State, 68 Miss. 605.

For the Trial Court to give instructions or to make statements to the jury which reflect on their honesty, integrity, or intelligence as jurors is improper.

Boyett v. United States, 48 F. 2d 482.

Further, the rule has been laid down that inquiry by the Trial Court as to the numerical division of the jury constitutes reversible error.

Brashfield v. United States, 272 U. S. 448;
Stewart v. United States, 300 Fed. 769;
Nigro v. United States, 4 F. 2d 781;
Weiderman v. United States, 10 F. 2d 745;
Jordan v. United States, 62 F. 2d 966;
Berger v. United States, 62 F. 2d 438;
Burton v. United States, 196 U. S. 283.

It is the contention of Appellant that jurors have a right to disagree. When, after a jury announce that they cannot agree, and the Court makes such remarks as hereinbefore set forth, and the jury immediately return a verdict of guilty, it is clear that such remarks coerced the jury. The public interests never require that a jury shall be coerced to an agreement upon a verdict. When a judge makes such remarks as herein complained of, he impairs their freedom of action.

In the instant case the Court told the jury that during his four years on the bench he had never had but one deadlocked jury. This was a matter of no concern to the jury. What could such a remark reasonable imply? The implication is that this was the stupidest jury that he had ever had. Also his remarks were further calculated to imply that the jurors were not reasonable persons and were stubborn in not reaching a decision. His remarks further carried the indication that the jurors were not intelligent or honest when he told them that "it would seem that you either can break through the barrier or some of you, or more of you, have not turned out to be the type of jurors we thought you were."

His remark that the case was not a particularly difficult one and that the main difficulty they had is that the case hangs entirely on circumstantial evidence was purely his opinion and invaded the province of the jury. How could the Court know whether the case was difficult for the jury to determine, or that their main difficulty was the fact that the case hung entirely on circumstantial evidence?

The Court further emphasized that it would be a "lot of waste of time" to have a second trial, regardless of the innocence or guilt of defendant. The Court further indicated that he desired them to reach a verdict by 5:00 o'clock. That all of the foregoing remarks were prejudicial is shown by the fact that after twenty-five minutes of further deliberation the jury returned a verdict of guilty.

It is to be noted that an inquiry by the judge numerically as to the possibility of reaching a verdict showed that seven members were of the opinion that no verdict could be reached. This was their conclusion after a day of deliberating. Yet, after the statement of the trial judge a verdict was reached in 25 minutes. This, plus the fact that no further evidence was presented clearly indicates that a verdict was arrived at by reason of the coercion of the trial judge.

A practice ought not to grow up of inquiring of a jury, when brought into Court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended because we cannot see how it may be material for the Court to understand the proportion of

division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge, or permits such a question on the part of the trial judge.

No juror should be influenced to a verdict by fear of personal criticism, possible disgrace, or pecuniary injury. No juror should be induced to assent to a verdict by a fear that a failure to agree would be regarded by the public as reflecting on either his intelligence or his integrity, or as a failure to perform properly a public duty. Personal consideration should never be permitted to influence a juror's conclusion.

Sharp v. State, 115 Neb. 737.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be reversed.

Respectfully submitted,

Walter L. Gordon, Jr.,
Attorney for the Appellant.